



Federal Communications Commission
Washington, D.C. 20554

January 19, 2024

DA 24-63
In Reply Refer to:
1800B3-IB
Released January 19, 2024

Mr. Darrick Servis, CFO
Common Frequency, Inc.
P.O. Box 4301
Davis, CA 95617
(via e-mail to darrick@commonfrequency.org)

Re: KQCF(FM), Chiloquin, OR
Facility ID No: 176407
File Nos. 0000162427, BSTA-20220425AAI

Dear Mr. Servis:

The Media Bureau (Bureau), in conjunction with the referenced application for license renewal,¹ has been considering the operations of KQCF(FM), Chiloquin, Oregon (Station), a noncommercial educational (NCE) broadcast station licensed to Common Frequency, Inc. (Licensee). For the reasons below, we have determined that the Station failed to operate from an authorized location for over twelve consecutive months and that its license, therefore, terminated automatically pursuant to section 312(g) of the Communications Act of 1934, as amended (Act).² Accordingly, we dismiss the Renewal Application as moot and delete the Station from our database.

Background

The Station's licensed facilities consist of an antenna attached to a tree in the yard of a residence (Licensed Site). Use of a tree as an antenna support structure for a broadcast station, which is uncommon but permissible if the licensee complies with our RF radiation rules, forms the basis for one of the arguments discussed herein.³ The Station, with special temporary authority (STA) from the Bureau,

¹ File No. 0000162427 (rec. Oct. 1, 2021) (Renewal Application).

² 47 CFR § 312(g).

³ Many different types of structures can be used to support communications antennas. *See* FCC Form 854, Instructions, Item 39. Licensee has used trees instead of traditional towers for this station at several locations. It states briefly that it did so because there is an airport in Chiloquin. *See* Common Frequency, Response to Letter of Inquiry (Jan. 3, 2024) (January Response) at 2. (Antennas mounted in trees are not exempt from the airport slope requirements in 47 CFR § 17.7(b), but Licensee apparently assumed it is unlikely that an airport would allow trees to obstruct air traffic.)

temporarily ceased broadcasting for three periods of almost one year each during the license term.⁴ It also moved transmitter sites three times. The Station's most recent move, in November 2022, forms the basis for our conclusions herein. On January 9, 2024, upon receipt of the Bureau's inquiry into these matters, Licensee voluntarily removed the Station from the air while awaiting a Bureau determination of whether the Station's operations from November 2022 onward at the current location have been permissible.⁵

Two factors are central to our analysis. The first is section 312(g) of the Act.⁶ That provision establishes that if a station fails to transmit broadcast signals for any consecutive 12-month period, its license expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may reinstate such a license to promote equity and fairness. Operations from an unauthorized transmitter site are not considered "broadcast signals" and are no better than silence.⁷ The purpose of this provision is to ensure that stations are serving the public as authorized and not warehousing spectrum that could be used by others willing and able to do so.

The second factor is section 73.1690(b) of the Commission's rules (Rules), which identifies circumstances in which licensees must obtain Commission authority prior to modifying a station's transmission facilities.⁸ Among the circumstances requiring a construction permit are:

- (1) Any construction of a new tower structure for broadcast purposes, except for replacement of an existing tower with a new tower of identical height and geographic coordinates;⁹ and
- (2) Any change in station geographic coordinates including coordinate corrections of more than 3 seconds latitude and/or 3 seconds longitude. FM and TV directional stations must also file a construction permit application for any move of the antenna to another tower structure located at the same coordinates.¹⁰

⁴ The Renewal Application identifies these periods as August 10, 2016 to August 10, 2017, June 3, 2018 to June 3, 2019, and October 27, 2019 to October 27, 2020. These periods of silence, representing about 34 percent of the license term, would be relevant if we were to consider whether the Station has met the criteria for license renewal. See 47 U.S.C. § 309(k). For example, the Bureau determined with respect to several other stations licensed to this Licensee that extended periods of silence warranted short-term renewals of one-year instead of the standard eight-year license term. See, e.g., *Darrick Servis*, Letter Order, DA 24-5 (MB Jan. 3, 2024) (KCFH(FM), Two Harbors, CA).

⁵ See File No. 0000235039 (rec. Jan. 9, 2024) (describing reason for silence as a Bureau suggestion of "inadvertent out-of-compliance" with section 73.1690(b)(2) and stating that Licensee "awaits communication/direction"). Stations must operate in accordance with the parameters of a license or other authorization (such as an STA) issued by the Commission. See 47 U.S.C. § 301.

⁶ 47 U.S.C. § 312(g), implemented by 47 CFR § 73.1740(c).

⁷ See *Eagle Broad. Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 592, para. 9, *aff'd sub nom., Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009) (*Eagle*); *Absolute Broad., LLC*, Memorandum Opinion and Order, FCC 23-38, n.69 and cases cited therein (rel. May 17, 2023); *Great Lakes Community Broad., Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8239, 8244-47 (MB 2009).

⁸ 47 CFR § 73.1690(b).

⁹ *Id.* § 73.1690(b)(1).

¹⁰ *Id.* § 73.1690(b)(2).

The record reflects that Licensee learned in September 2021 that the owner of the Licensed Site was selling the property and would require the Station to vacate.¹¹ Licensee requested and received Commission authority, expiring November 5, 2022, to operate temporarily from a site about 540 meters away (STA Site), also from a tree.¹² In October 2022, the Bureau granted a permit expiring October 2025 authorizing the Station to move to a cell tower on a permanent basis (Cell Site); Licensee has not yet constructed that facility.¹³ In May 2023, about six months after expiration of the authorization for the STA Site, Licensee emailed the Bureau staff member who had granted the STA to state that the Station had resumed “normal licensed operations” on November 1, 2022.¹⁴ The Bureau, however, observed an apparent inconsistency between that assertion and Licensee’s prior statements that the Licensed Site was no longer available.¹⁵ The Bureau attempted, by email, to clarify whether the Station’s operations from November 1, 2022 onward were from an authorized location.¹⁶ In June 2023, Licensee responded that it was operating with an antenna mounted “back at the authorized site,” which it described as a “tree adjacent to the last tree it was licensed at.”¹⁷ Licensee’s June Letter included a brief contention that its current facilities were authorized under section 73.1690(b)(2) of the Rules.¹⁸ The Bureau requested additional clarification in a November 20, 2023 letter of inquiry.¹⁹ The Bureau therein questioned whether Licensee returned to the Licensed Site and, if not, asked for further explanation of the purported relevance of section 73.1690(b)(2). That provision would, the Bureau stated, permit *correction* of misstated coordinates but not relocation of the Station’s antenna.²⁰

Licensee, in a January 3, 2024 response,²¹ acknowledges that it did not regain use of the Licensed Site.²² Rather, it moved the Station’s antenna and transmitter to a new location (Current Site), *i.e.*, a tree belonging to a neighbor whose property borders the Licensed Site.²³ The Licensed Site and the Current

¹¹ The Station was, as a result, silent for five days in September 2021 but renegotiated its agreement with the owner and returned to the air temporarily, pending a move. *See* File No. BLSTA-20210902AAE (filed Sept. 2, 2021, dismissed Oct. 5, 2021); Resumption of Operations Notification (Oct. 5, 2021). That brief period off air, as well as two other short periods of silence during site moves, did not require notification to or authority from the Commission. *See* 47 CFR § 73.1740.

¹² *See* File No. BSTA-20220425AAI (filed Apr. 25, 2022, granted May 9, 2022, and expired Nov. 5, 2022) (STA Request). The STA Site was located at 42° 34’ 27.8” N and 121° 51’ 40.9” W (NAD 83).

¹³ File No. 0000185079 (granted Oct. 11, 2022).

¹⁴ *See* Email from Randy Henry, Station Manager, randy_henry@hotmail.com to Dale Bickel, Engineer, FCC Dale.Bickel@fcc.gov FCC, (9:30 am, May 11, 2023) (Resumption Notice).

¹⁵ *E.g.*, STA Request at Attach. 4.

¹⁶ *See* Email from Dale Bickel, Engineer, FCC, Dale.Bickel@fcc.gov to Randy Henry, Station Manager, randy_henry@hotmail.com (1:40 pm, May 11, 2023).

¹⁷ Common Frequency, Inc., Letter to Dale Bickel, Engineer, Supplementary Information Concerning STA BSTA-20220425AAI (June 2, 2023) (June Letter) at 1.

¹⁸ *Id.*, citing 47 CFR § 73.1690(b)(2) (emphasis added).

¹⁹ Letter of Inquiry (MB Nov. 20, 2023) (Inquiry).

²⁰ *Id.* at 5, para. 2.

²¹ Common Frequency, Inc., Letter to Marlene Dortch, Secretary, FCC (rec. Jan. 3, 2024) (January Response).

²² *Id.* at 1-2.

²³ Licensee describes the relationship between the Current and Licensed Sites as a return to the same “approximate area of broadcast, and reestablish[ment of] what it perceived to be licensed operations.” *Id.* at 1.

Site are approximately 32 meters apart, and differ with respect to geographic coordinates, street addresses, and owners. Licensee argues that the move required no Commission authorization because the coordinates of the two trees differ by less than one second latitude and longitude,²⁴ whereas Licensee interprets section 73.1690(b)(2) to allow any move of three seconds or less without approval.

Analysis

Licensee's contention that its operations from November 1, 2022 onward have been authorized focuses on the first sentence of section 73.1690(b)(2). That Rule specifies that a permit is required for "*Any change in station geographic coordinates including coordinate corrections of more than 3 seconds latitude and/or 3 seconds longitude.*"²⁵ Licensee contends that this language is "vague" and "inexact," and that Licensee did not intend to violate the rule, but interpreted it as excluding all location changes of three seconds or less from the requirement of obtaining Commission consent.²⁶ Indeed, Licensee argues that the three-second language would be redundant if permits were necessary for smaller moves.²⁷

Licensee misunderstands this Rule. The three-second language in section 73.1690(b)(2) addresses situations in which a station is not physically moving to a new location or changing licensed parameters. It pertains only to correction of inaccurate coordinates for an existing, authorized location. Such a correction may be necessary, for example, due to discovery of a surveying error after construction. The Commission adopted the three-second provision over 20 years ago and has since applied it consistently only to coordinate corrections. The Rule's purpose is to allow licensees to correct relatively minor, inadvertent errors by filing a single license modification application²⁸ rather than the prior two-step process, which required a construction permit followed by an application for license.²⁹ The one-step

²⁴ The licensed coordinates are 42° 34' 10.0" N, 121° 51' 41.7" W (NAD 83). See File No. 0000125106 (granted Nov. 3, 2020) (License). The coordinates from which the Station is operating are 42° 34' 9.1" N, 121° 51' 42.4" W. The two locations, thus, differ by 0.9 seconds latitude and 0.7 seconds longitude. Licensee states that, because it cited section 73.1690(b)(2) in its June Letter and the Bureau did not quickly inform it that the Rule does not permit relocations within three seconds, Licensee did not take measures that it otherwise would have to comply with the Bureau's reading of the Rule. See January Response at 9.

²⁵ 47 CFR § 73.1690(b)(2) (emphasis added).

²⁶ January Response at 9.

²⁷ Licensee opines that if the Rule were to be understood as suggested by the Bureau, the Rule would just have stated "*any change in station geographic coordinates shall require a construction permit, or all moves require construction permits.*" January Response at 8 (emphasis added). The Rule, as originally adopted, contained just such an all-inclusive wording but was modified to make a small exception for corrections within three seconds. See *infra*, note 29.

²⁸ See 47 CFR §§ 73.1690(b)(2), 73.1690(c)(11).

²⁹ As originally adopted, section 73.1690(b)(2) required construction permits for "Any change in station geographic coordinates, including coordinate corrections" and rejected a commenter suggestion to permit corrections solely by license application. See *Amendment of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12435, 12405-06 (1997). The Commission later added the language at issue to exempt corrections of three seconds or less. See *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications*, Second Report and Order, 15 FCC Rcd. 21649, 21667, paras. 34-35 (2000) (*Streamlining*). The Commission thereby streamlined the process for correcting coordinates by replacing the former two-step process (first filing an application for a construction permit, and second, after grant of the construction permit application, an application for license to cover the permit) with a single step (filing of an application to modify the station's existing authorization).

process applies only to corrections and not to physical relocations because even short relocations can alter a station's signal.³⁰

This case involves a station relocation rather than a correction of an error in coordinates. Moreover, even assuming that Licensee misinterpreted the Rule as providing an exemption from construction permit requirements, Licensee was clearly mistaken in its further assumption or conclusion that the Rule negates the need to obtain any Commission authority whatsoever. The Rule simply condenses the Commission approval process from two steps to one. Licensees availing themselves of the construction permit exemption to correct an error in coordinates (rather than a site change) must nevertheless seek authority to operate from their correct coordinates by following a single step of applying for a modification of license.³¹ Licensee did not apply for such a modification.³²

In addition, a permit was necessary under the immediately preceding rule, section 73.1690(b)(1), which pertains to new antenna support structures. Licensee mistakenly asserts that section 73.1690(b)(1) is inapplicable because it is worded in terms of “*construction of a new tower structure for broadcast purposes*,” whereas Licensee did not build a tower.³³ Essentially, Licensee is arguing that antenna mounts in trees are exempt from licensing requirements because trees are neither towers nor newly constructed. This argument is without merit. A tree used to hold a broadcast antenna for the first time is a new antenna support structure. The rule uses the term “new tower structure” rather than the longer phrase “new antenna support structure” because support structures other than traditional towers are uncommon for reasons based on engineering standards and practices.³⁴ However, new placement of an antenna in a tree is no different for licensing purposes than placement on a metal tower at that location. There is nothing about the nature of a tree that would subject it to different regulations or allow trees in different locations to be considered interchangeable. The Commission needs to know the precise location of any structure upon which a broadcast antenna is mounted to ensure adequate interference protection to other stations and safety of air navigation. When a broadcaster applies for a construction permit, the Commission

³⁰ For example, by examining a construction permit application, the Bureau can consider any changes in spacing, compliance with international agreements, and terrain shielding which can result even from short-distance moves. See *Streamlining*, 15 FCC Rcd at 21667, para. 38 (*de minimis* changes in a short-spacing context may raise technical or international issues appropriately considered in an application for construction permit). Cf. *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television*, Report and Order, FCC 23-25, paras. 40-41 (rel. Apr. 17, 2023) (modifying rules applicable to low power television stations to match those for full service stations in section 73.1690(b)(2) which “apply only to coordinate corrections and not to relocations”); *Amy Meredith*, Letter Order, 37 FCC Rcd 7266 (MB 2022), *recon. denied*, DA 22-1352 (MB rel. Dec. 22, 2022) (*Meredith*) (rejecting argument that construction 30 yards from permitted location was sufficiently close to satisfy requirements of original construction permit for FM translator under 47 CFR § 74.1254(b)(4)).

³¹ See 47 CFR § 73.1690(c)(11). Licensee cites no case indicating that a station's move of three seconds or less does not require Commission approval of a construction permit application and then a license application.

³² Although the Bureau would have dismissed a one-step application from Licensee because the move was subject to the two-step process requiring a construction permit, making such a filing would have alerted Licensee of its error concerning the requirements of section 73.1690(b)(2).

³³ 47 CFR § 73.1690(b)(1) (emphasis added).

³⁴ *E.g.*, antennas attached to trees may be more susceptible to damage from wind, lightning, and wildlife. Part 73 of the Rules does not define “tower structure.” Part 17, which is applicable to communications structures including those associated with broadcast stations, uses the term “antenna structure.” That term is defined as a structure that is constructed or used to transmit radio energy, or that is constructed or used for the primary purpose of supporting antennas to transmit and/or receive radio energy, and any antennas and other appurtenances mounted thereon, from the time construction of the supporting structure begins until such time as the supporting structure is dismantled. 47 CFR § 17.2(a).

announces the application by public notice, thereby enabling potentially interested parties to comment on such matters.

In sum, Licensee was required to obtain Commission approval prior to moving to the Current Site, but did not do so. Operation from an unapproved site, even one relatively close to that permitted, is unauthorized.³⁵ The Commission has consistently held that broadcast licenses cancel automatically as a matter of law pursuant section 312(g) when a station has operated from an unauthorized site for more than 12 months.³⁶ Because Licensee operated the Station solely from an unauthorized location from November 1, 2022 onward, its license expired after 12 consecutive months, *i.e.*, on November 1, 2023.

We have considered on our own motion whether there are circumstances justifying reinstatement of the Station's license, but conclude that there are not. Section 312(g) grants the Commission authority to reinstate expired licenses in limited circumstances, including if the Commission finds that such action would "promote equity and fairness."³⁷ The Commission has exercised that discretion only rarely, such as in natural disasters, where silence or unauthorized operation resulted from compelling circumstances beyond the licensee's control.³⁸ Licensee has failed to provide any evidence that its unauthorized operation at the Current Site was due to factors beyond its control. Rather, it chose to operate from the Current Site, for which it had no FCC approval, instead of pursuing other available options that might have resulted in receipt of operating authority such as seeking an extension of temporary authority for the

³⁵ See *Chinese Voice of Golden City*, Memorandum Opinion and Order, 35 FCC Rcd 567, 570, para. 11 (2020), *aff'd sub nom. Chinese Voice of Golden City v. FCC* (D.C. Cir. Nov. 30, 2021) (per curiam) (rejecting argument that operations from location 256 feet from authorized site was *de minimis* and did not trigger automatic expiration under section 312(g)). See also *Liberty Univ.*, Memorandum Opinion and Order and Consent Decree, DA 23-899 (MB rel. Sept. 29, 2023) (agreed termination of NCE station license and \$10,000 civil penalty for licensee that incorrectly submitted a license modification application for correcting licensed coordinates when in fact it had changed sites and, thus, violated 47 U.S.C. § 301 and 47 CFR § 1.17(a)(2) by representing, without intention to deceive Commission, that it was operating as licensed following expiration of STA but was actually operating from different coordinates about one second away); *Meredith*, 37 FCC Rcd at 7269 (rescission of initial license of FM translator station built 30 yards from authorized location).

³⁶ *Eagle*, 23 FCC Rcd at 592, para. 9 (unauthorized, unlicensed broadcasts cannot constitute transmission of broadcast signals to avoid license expiration under section 312(g)); *Absolute Broad., LLC*, Memorandum Opinion and Order, FCC-23-38 at 8, para. 18 (2023) (unauthorized operation is no better than silence for purposes of section 312(g)); *A-O Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 608, para.10 (2008), *recon. dismissed*, *Barry Wood, Esq.*, Letter Order, 24 FCC Rcd 13666 (2019) (*A-O*) (transmission from unauthorized location insufficient to avoid consequences of section 312(g)); *Int'l Aerospace Sols., Inc.*, Memorandum Opinion and Order, FCC 23-8, para. 9 (2023) (upholding determination that station licenses expired pursuant to section 312(g) due to combined silence and operation from an unauthorized site).

³⁷ 47 U.S.C. § 312(g).

³⁸ See, e.g., *V.I. Stereo Commc'ns Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstatement warranted for station that sustained damage from three hurricanes where original facilities were destroyed and the rebuilt facility also sustained damage). See also *Community Bible Church*, Letter Order, 23 FCC Rcd 15012, 15014 (MB 2008) (reinstatement warranted where licensee took all steps needed to return to air, but remained off air to promote air safety after discovering and reporting that FCC and FAA records contained incorrect tower information); *Sumiton Broad. Co., Inc.*, Letter Order, 22 FCC Rcd 6578, 6580 (MB 2007) (reinstating license where silence was necessary to comply with court order); *Universal Broad. of New York, Inc.*, Memorandum Opinion and Order, 34 FCC Rcd 10319 (MB 2019) (station's inability to file an STA to resume service due to a federal government shutdown was a compelling circumstance under section 312(g)).

STA Site,³⁹ constructing pursuant to its construction permit for the Cell Site, or obtaining approval for the Current Site.⁴⁰

Accordingly, the license for KQCF(FM), Chiloquin, Oregon cancelled automatically pursuant to section 312(g) of the Act and its call sign is deleted. The KQCF(FM) application for license renewal, File No. 0000162427, is dismissed as moot.⁴¹

Sincerely,

Albert Shuldiner

Albert Shuldiner
Chief, Audio Division
Media Bureau

cc (via electronic mail):
Todd Urick (todd@commonfrequency.org)
(Technical Representative for Common Frequency, Inc.)

³⁹ We note that Licensee states that it abandoned the STA Site due to electrical difficulties there. *See* January Response at 10-11.

⁴⁰ Licensee describes the Station as providing “vital information for the town” in a “rural area of limited broadcast media.” January Response at 2. We recognize that the Station, during the periods in which it was not silent or at an unauthorized location, has provided the sole transmission service licensed to Chiloquin. However, we also note that Chiloquin receives a 70 dBu city-grade signal from three FM commercial stations, 60 dBu service from one NCE FM station, and primary service (2 mv/m) from two AM stations. Most of these stations are licensed to Klamath Falls, Oregon, which is approximately 27 miles from Chiloquin. Given this number of available signals, we are not concerned that there would be a lack of broadcast communications sources in the event of an emergency. *See A-O*, 23 FCC Rcd at 613-14, paras. 19-20 (reinstatement of license lost pursuant to section 312(g) not warranted where other signals could provide emergency communications). Moreover, the City of Chiloquin government (City) does not appear to rely on any broadcast signal, including that of the instant Station, for the City’s emergency alert plan. Rather, the City directs residents to sign up for emergency email notifications through its website, which is connected to OR-Alert, a state-wide system used by Oregon cities, counties, and emergency agencies to send local alerts to residents. *See* City of Chiloquin, Sign Up for Emergency Notifications, <https://www.cityofchiloquin.org/community/page/emergency-alert-project> (accessed Jan. 17, 2024). Furthermore, establishing future radio service in Chiloquin remains a possibility because the Station’s frequency would become available for application by others seeking to modify existing stations at any time and/or in a future filing window for new NCE stations.

⁴¹ We reject Licensee’s suggestion that the Station’s unauthorized operations, which occurred after the eight-year term for which the Station is seeking license renewal, is not relevant to the Renewal Application. *See* January Response at 11. Because that lack of authorized operations caused the Station’s license to cancel pursuant to section 312(g), there is no license to renew. Further, Licensee is wrong in its belief that there would have been no need to amend the Renewal Application to reflect changes occurring after filing. *Id.* Applicants are responsible for the continuing accuracy and completeness of information furnished in a pending application. *See* 47 CFR § 1.65.